Saia Motor Freight *and* Teamsters Local 745, Petitioner. Case 16–RC–10184

April 11, 2001

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on April 16, 17, and 18, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 170 for and 179 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that the election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting in part.

Contrary to the hearing officer, I do not find that the Employer engaged in objectionable conduct by maintaining and operating a video camera outside its premises during the union organizing campaign. Accordingly, I would not rely on this conduct in setting aside the election.

The record establishes that in the fall of 1999 approximately 6 months before the election, the Employer erected a security system on the exterior of its property. It consisted of two security cameras mounted atop its outside guard shack. These cameras which were mounted in fixed positions, pointed toward the Employers' terminal and main entrance. According to uncontradicted testimony, the cameras were installed in response to the theft of televisions from the Employer's property and were positioned to permit the Employer to record information from trucks and tractors leaving the Employer's property.

Notwithstanding that the video camera security system was installed and maintained for valid security reasons wholly unrelated to any union organizing campaign, and the fact that there was neither evidence nor claim that the system was used for any other purpose during the organizing campaign, the hearing officer found that the Employer's continued operation of the system during the critical period was objectionable. Specifically, the hearing officer concluded that some employees might reasonably believe that the cameras were recording whether they accepted handbills being distributed at the main entrance, or were recording their arrival or departure from the property including for the purpose of voting. Accordingly, he found that the objection was meritorious. I disagree.

Where, as here, the Employer, for valid reasons, has installed and maintained a security system, I would not find that it is precluded from continuing to operate that system, in the same neutral manner during a union organizing campaign. See, e.g., *Lechmere, Inc.*, 295 NLRB 92, 99–100 (1989), enf. denied on other grounds 502 U.S. 527 (1992) (installation of rooftop camera did not violate Section 8(a)(1), even where protected concerted activity is recorded, where general security purposes otherwise justify its existence).[1] The asserted fact that some employees might believe that the system is recording their Section 7 activity is insufficient to establish that the system is objectionable.

Accordingly, I find no merit to this objection.

APPENDIX

HEARING OFFICER'S REPORT ON OBJECTIONS AND CHALLENGES

Pursuant to a Stipulated Election Agreement approved by the Acting Regional Director on March 16, 2000, a secret-ballot election was held on April 16, 17, and 18, 2000, among the employees in the appropriate bargaining unit:

> INCLUDED: All drivers, including city, road and hostlers, dock personnel, and mechanics employed at the Employer's facility at 1002 West Oakdale, Grand Prairie, Texas 75050.
> EXCLUDING: All other employees, including office clerical employees, dispatchers and guards, and supervisors as defined in the Act.

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 1, 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 22.

[2] In adopting the hearing officer's recommendation to sustain Objection 21, we note that the Petitioner argued that the Employer engaged in objectionable conduct by disparately enforcing its no-solicitation rule. The hearing officer credited testimony that while other solicitations were allowed in the breakroom and in other clearly work areas, employees were regularly restricted from solicitation and distribution on behalf of the Petitioner.

Finally, because we agree with the hearing officer finding that the conduct alleged in the Petitioner's Objections 9 and 21 constitutes objectionable conduct, we find it unnecessary to pass on the hearing officer's findings with regard to the Petitioner's Objection 4. Accordingly, we do not address our colleague's dissenting opinion with regard to that objection.

[1] See generally *Eby-Brown Co. LLC*, 328 NLRB 496, 513 (1999) ("video camera whose legality was challenged at the hearing was installed in May 1993 for reasons which had nothing to do with union activity").

The tally of ballots served on the parties on April 18, 2000, following the election showed these results:

Approximate number of eligible voters	400
Number of void ballots	1
Number of votes cast for Petitioner	170
Number of votes cast against participating labor organization	171
Number of valid votes counted	341
Number of challenged ballots	16
Number of valid votes counted plus challenged ballots	357
Challenges are sufficient in number to affect the results of the election.	

On April 24, 2000, the Petitioner timely filed objections to conduct affecting the outcome of the election.

On May 5, 2000, the Acting Regional Director issued and served on the parties an Order directing hearing on objections and challenges and notice of hearing.

The hearing was held in Fort Worth, Texas, on May 24 and 25, 2000, by me, who was designated as hearing officer by the Acting Regional Director.

All parties to the proceeding were present and were given full opportunity to be heard, to examine and cross-examine the witnesses, and to introduce evidence bearing on the issues. The Employer and the Petitioner submitted briefs which have been carefully considered. Based on the entire record in this hearing, from my observation of the witnesses, after examination of all of the exhibits and following the careful consideration of the arguments of the parties, the hearing officer makes the following

FINDINGS OF FACT

Background

The Employer operates an over-the-road and local pickup and delivery freight hauling company with terminals in several states. This case involved the Grand Prairie, Texas terminal, which has about 400 employees. Grand Prairie is a suburb of Dallas and witnesses referred to the terminal in question as being in Grand Prairie and Dallas, interchangeably. The critical period for objectionable conduct in this case was March 1 through April 18, 2000.

Petitioner's Objection 4

The Employer restrained and coerced employees by maintaining cameras and videotaping employees engaged in lawful union activities.

From the testimony of employees Grider, Pfisterer, and Colin Clements, a line-haul driver, as well as Union Organizer Kline and M.E. Hardwick, the Employer's terminal manager, it became clear that the following situation existed both before and during the election. The Employer's property fronts on West Oakdale Road. The entrance is about 70 yards south of a guard shack, which is located on a fence line between the main entrance and the terminal. On the west side of the guard shack, near the top are mounted two video cameras pointing slightly downward. The camera on the south end of the guard shack pointed north, toward the terminal. The camera on the north end pointed south, generally in the direction of the main entrance on West Oakdale Road.

Union Organizer Kline testified without contradiction that as he left the preelection conference on April 16 he asked a guard in the guard shack if the cameras were operating and the guard answered that they were. It should be noted that the cameras would record persons walking in and out of the facility in the vicinity of the guard shack as demonstrated in a sample tape from the cameras submitted as Employer's Exhibit 16.

There were discrepancies in the testimony of the various witnesses as to how long the cameras had been in place, but I would credit Hardwick, the terminal manager, who recalled that the cameras were installed at the direction of the Employer's security department after a trailer loaded with large-screen television sets were stolen from the terminal in the fall of 1999. I would also credit Hardwick as to the capabilities of the cameras: they are fixed and project images on monitors in the guard shack, while recording the comings and goings of tractor-trailers through the security checkpoint. Hardwick testified that the principal purpose of the cameras was to make a record of the tractor licenses and the trailer numbers of the tractor-trailers leaving the Employer's property.[1] Hardwick also noted that the guards assigned to the guard shack also recorded information about tractors and trailers leaving the property.

Hardwick further testified that the Employer had not told employees the purpose of the cameras.

The Petitioner argued in its brief that the cameras have had an adverse effect on the union's handbilling at the main entrance, with some employees expressing "a reluctance or unwillingness to take union literature offered to them at the entrance (Tr. 37, 151)." The Employer countered that the only reason for the cameras was security, evidenced by the fact that they were mounted on the guard shack, that they had wide angle lenses, and that people standing at the main entrance would be visible only as blurs on the monitor.

The standard for finding filming of employees to be improper was set in *F. W. Woolworth Co*., 310 NLRB 1197 (1993), where it was noted that "the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *Waco, Inc.,* 273 NLRB 746, 747 (1984), and cases cited therein." More recently, the Board reaffirmed this principle in *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999). Further, the Board has found that such picture taking can be coercive based merely on the appearance that filming occurred. *Tennessee Packers, Inc*., 124 NLRB 1117 (1959).

Whether the filming was justified is a matter of fact based on the evidence. Here, the Employer offered testimony that the sole purpose of the cameras mounted on the guard shack was to record information about the trucking equipment leaving the property, something also done by the guards. However, it is

[1] There was also testimony that the Employer filmed union handbilling at the main entrance in July 1999 with cameras other than the ones mounted on the guard shack. This filming was alleged as an unfair labor practice in Cases 16–CA–19981–1, –2, and –4; an administrative law judge dismissed this allegation.

also a fact that the cameras record the comings and goings of employees, including persons arriving and leaving the premises for the purpose of voting. The voters would have no way of knowing whether their identities were being recorded. *Days Inn Management Co.*, 299 NLRB 735 (1990), enf. denied in pertinent part 930 F.2d 211 (2d Cir. 1991) (making a list of employees arriving to vote found objectionable). Further, employees may reasonably have believed that the south-pointing camera was recording whether they took or rejected handbills from the Union at the West Oakdale Road entrance. In these circumstances the Employer did not clearly establish justification for the use of the cameras; their presence should be found to be coercive.

I recommend that the Petitioner's Objection 4 be sustained.

Petitioner's Objection 9

The Employer interfered with the election by refusing to permit employees believed to be supporters of Petitioner to attend meetings at which union representation was discussed. In some instances, employees were paid to attend such meetings and thereby received greater compensation than did supporters of Petitioner. Attendance at such meetings was mandatory for those employees instructed to attend.

Employee Grider said that the Employer conducted weekly meetings leading up to the election and that road drivers were required to attend, except for those involved in the organizing "or anybody that was considered strong union." Grider was not allowed to attend. Ricky Carlton, a city driver, said that he and Gary Armstrong were told they could not attend the meetings because their minds were already made up. Carlton said the meetings were held on worktime and that he was required to work during the meetings.

Pfisterer, a dockworker, said he was told by Supervisors Wade Carrier, John Smith, and Hardwick that he could not attend because he was a lost cause, as evidenced by his union hat and shirt. He said that in March he was removed from one meeting and sent to work. (Smith confirmed excusing Pfisterer from one meeting.) Employee Colin Clements said he was barred from the meetings by Supervisor Don Safford. Similar testimony came from employees Jeff Picha, Lucas, and Moises Gutierrez.

Line-haul driver Tom Borton said that he was paid for at least one such meeting at the rate of $15.50 an hour. On one occasion he was paid $15.50 to attend the meeting and then made his regular run to Prescott, Arkansas, and back. Terminal Manager Hardwick confirmed that employees were paid to attend these meetings in March and April.

The Petitioner argued that the Employer engaged in objectionable conduct by barring union-supporting employees in the presence of coworkers, citing *Wimpey Minerals USA, Inc*., 316 NLRB 803 (1995), and *Delchamps, Inc.,* 244 NLRB 366 (1979), enfd. 653 F.2d 225 (5th Cir. 1981). The Employer contended that there was no objectionable conduct, citing *Luxuray of New York*, 185 NLRB 100 (1970), enfd. in part 447 F.2d 112 (2d Cir. 1971); and *Holiday Inn of Palo Alto-Stanford*, 302 NLRB 572 (1991). *Luxuray* is one in a line of cases holding that an employer may exclude prounion employees from meetings held on working time. Also see *Mueller Brass Co.*, 220 NLRB 1127 (1975), enf. denied 544 F.2d 815 (5th Cir. 1977); and *Spartus Corp.*, 195 NLRB 134 (1972), enfd. 471 F.2d 299 (5th Cir. 1973).

Delchamps stands for the proposition that an employer may not discriminate against prounion employees in such matters as paid attendance at a meeting to which off-duty employees were allowed to clock in, or where a luncheon or dinner was served.

In this case the facts appear to fall somewhere in between. Clearly prounion employees were prevented from attending captive audience meetings, for which other employees admittedly were paid; in at least one case an employee was removed from such a meeting. The question would be whether any of the employees suffered any loss of pay as a result of being excluded from these "worktime" meetings. In the case of dockworkers and city drivers who were paid by the hour, there presumably was no loss of income; the meetings were held during worktime, and thus, everyone on the clock whether working or attending a meeting was paid. That is the essence of the *Luxuray* cases.

However, that was not the case with the line drivers. The evidence showed that they also were paid at the rate of $15.50 an hour in the case of employee Borton. Assuming that most of the meetings lasted an hour or less, the line drivers were paid $15.50 or some portion of that rate for attending the meeting plus their regular pay for making their runs that day. But the line drivers who supported the Union and were excluded from the meetings, either waited in the breakroom or were sent on to take their runs, as testified to by Lucas. Thus, the line-haul drivers excluded from the meetings were treated differently because of their union support. Based on *Delchamps,* that would be objectionable conduct.[2]

I recommend that Petitioner's Objection 9 be sustained.

Petitioner's Objection 21

The Employer interfered with the election by maintaining an invalid and unlawful no-solicitation rule.

Employee Fred Pfisterer testified about the terminal breakroom used by dockworkers and drivers for breaks and to eat lunch. He said the room contained vending machines for coffee, soft drinks, and food, plus tables and chairs for the use of employees. He also recalled that the room was used by the Company for conducting meetings of employees.

Pfisterer said that one day about 3 to 6 weeks before the election he was in the breakroom and saw employee Randy Rogers handing union literature to employees who were not on the clock. Larry Wesley, who was on the clock, came in to get a soft drink and Rogers was about to give him a handbill. Pfisterer said he intervened by taking the handbill away from Rogers and telling him he could not give it to Wesley because that employee was working. Supervisor Larry Nichols then asked Rogers what he was doing and Rogers answered that he

[2] In *Delchamps,* 244 NLRB 366, supra at fn. 3, the Board stated:

> In view of our finding that the exclusion of union supporters and the statements to them about why they were being excluded constitute violations of Sec. 8(a)(1), contrary to the Administrative Law Judge's statements, we, of course, also find such conduct to be objectionable in a representation case context.

was handbilling. Nichols, according to Pfisterer, said that it was a work area and that employees could not handbill in there; Rogers refused to stop. Nichols told him to clock in and he did. Nichols led Rogers away to an office. Pfisterer said there were several other employees in the breakroom during this incident. Pfisterer also recalled that he was told by Supervisors M.D. Hardwick, Wade Carrier, and John Smith that employees were not supposed to handbill in the breakroom.

The Employer established on cross-examination of Pfisterer that there is an internal window in the breakroom through which drivers receive their dispatch documents. There is also a window where drivers leave their inbound manifests and that the room is used both for breaks and work, at times simultaneously. On redirect examination, Pfisterer said that when drivers are receiving manifests at the dispatch window, each transaction is short.

Pfisterer said he had never seen a written rule about solicitation, but that Don Safford, the assistant terminal manager, and Hardwick had said solicitation was not to be done on the clock. The employee said that employees were allowed to sell cookies for the Girl Scouts in the breakroom and to operate football betting pools there; "Those things have free run. You can do that on Company time." He said he had sold Girl Scout cookies in the terminal and so had Supervisor Nichols. Pfisterer said no one was ever cautioned about doing such things as selling Girl Scout cookies. On recross-examination, Pfisterer said he last sold school cookies for his daughter in August or September 1999 and that former Supervisor Frank Easley bought cookies from him; he said he was never counseled about this.

Pfisterer stated that he was removed from one of the captive-audience meetings in March and he stated that he was going to go hand out union literature in the breakroom. According to Pfisterer, Smith said he would like to see him try.

The Employer's rule, as set out in the line driver handbook (P. Exh. 9) states:

> Work time is for work. We need to diligently direct our time and attention to taking care of our work and our customers, thereby, insuring our company profitability and our job security. Therefore, we request that you not use your work time or interfere with another employee's work time to sell, collect, or solicit for any other business, organization or other cause. Employees are not permitted to distribute any advertising material, literature, or other non-work materials during work time or at any time in work areas.
>
> Persons not in the employ of the company will not be permitted to make solicitations or distributions of any kind on company property at any time.

The Union offered as Petitioner's Exhibit 17 a portion of the orientation manual, given to new employees, which contains a no-solicitation rule similar to the one from the line driver handbook, except that the orientation rule includes the sentence, "Work time does not include scheduled breaks or meal periods."

Colin Clements, a line-haul driver, explained that when drivers needed to obtain the papers for a trip, the documents usually were sitting on a ledge at the dispatch window in the breakroom. He said that if the papers were not ready drivers sat in the breakroom until their names were called. He said the vending machines were available to the drivers while they waited. He stated that obtaining the papers at the window usually required only a minute or 2.

Jeff Picha, a city driver, said that in 1999 after he was identified as an in-house organizer for the Union, Terminal Manager Hardwick told him that he could not stop anyone from work or be in a working area to solicit for the Union. Picha said Hardwick stated that the breakroom was a working area and that the only nonworking area was on the other side of the fence from the terminal. On cross-examination, he said that Hardwick read the no-solicitation rule to him.

Employee Stephen Lucas said that in April 2000 before the election he was in the breakroom handing out booklets for the Teamsters Black Caucus. He put the booklets on a table next to his logbook while he left to hook up his trailer. When he returned another driver told him that Supervisor Robert Cantu had taken the booklets away. He found Cantu and asked why he had taken the booklets; the supervisor said it was because Lucas had been soliciting in the breakroom, which was a working area. On cross-examination, Lucas said he only gave booklets to employees who were not working. He stated that Cantu told him that the only nonworking area was in the parking lot.[3]

Employee Randy Rogers testified that one day 2 weeks before the election, he was in the breakroom waiting for a dispatch and he asked another employee what he thought about the Union; the man said he wanted to remain neutral because he was a new employee. Rogers said that Supervisor Larry Nichols then took him into Hardwick's office and told him that he could not be talking about the Union on company time and that the breakroom was a work area. Rogers asked where he could talk about the Union and Nichols answered outside the fence or off the clock, meaning "out in the parking lot and beyond to the street." He was given a writeup.

Rogers said that earlier in the same week he was giving pamphlets to employees in the breakroom and Nichols asked him if the people were on the clock; Rogers said no. He also said he was not on the clock. According to Rogers, Nichols stated, "I don't know how, but I am going to get you." Later, he said, Pfisterer stopped him from giving a pamphlet to an employee who was on the clock. Nichols took Rogers to the dock and left him there while the supervisor spoke with the other employee (Wesley). Rogers said he did not speak with Nichols further that day.

The Employer called Larry Nichols, the city operations manager. He said he first spoke with Rogers in the summer of 1999 after receiving a fax naming him as an in-plant organizer; he said he read the no-solicitation rule to Rogers.

Nichols stated that in March 2000 he was in the city dispatch office and saw Rogers hand union literature to Wesley, a dockworker, in the breakroom. Nichols said he then asked Rogers if he knew whether Wesley was working and Rogers said no. Nichols went to Wesley and asked if he was on lunch or break and the employee said no. Nichols said he later met with

[3] The Petitioner asked that I take notice of the administrative law judge's decision in Cases 16–CA–19981–1, et al., and I have done so.

Rogers, with Cantu present, and asked if he knew about the no-solicitation and insubordination rules; Rogers said yes. That morning, Nichols testified that he had told Rogers to get his bills and go to work. Five minutes later he saw Rogers talking to Pfisterer. Nichols said he asked Rogers if he understood the instructions to go to work; Rogers laughed and went to his truck.

Nichols said that on the morning of March 16 (apparently the next day) he got a voice mail from a dispatcher saying he had seen Rogers soliciting union business to Cris Paulsen at the city dispatch window at a time when Paulsen was waiting for a dispatch. Nichols said he asked Paulsen if Rogers solicited him while Paulsen was working and Paulsen said yes. Nichols denied ever telling an employee that the only place to solicit was outside the fence. He also denied telling Rogers that he would get him.

On cross-examination, Nichols stated that it was permissible to solicit in the breakroom if both employees were not working. He said that if an employee was in the breakroom getting a soft drink, presumably he would be on break and it would be acceptable to solicit him. Nichols acknowledged that Paulsen had said in a written statement to the Employer that he had also been approached several times while on duty by Moises Gutierrez, who urged him to sign a union card. Nichols admitted that Gutierrez, who was not a member of the in-plant committee, was not disciplined.

M.D. Hardwick, the terminal manager, testified on behalf of the Employer that employees were allowed to solicit in the breakroom, as long as both parties were not working. He denied that the Company allowed solicitation in work areas for any reason. He said one employee died in August or September 1999 and there was an attempt to take up a collection but that was not allowed. He said a woman selling breakfast food in the office in December and a man selling candy for his son's baseball team in November or December were asked to stop.

On cross-examination, he was asked if a city driver sitting in the breakroom drinking a coke and waiting for his bills could be solicited; he said no, he would not be on break. He said line drivers in the breakroom both before and after dispatch time had been allowed to solicit. Hardwick testified, "We have allowed solicitation in the breakroom from the word go." He said only persons in the room for a work-related purpose could not be solicited.

The Petitioner recalled to the stand Rogers, who stated that Nichols had tried to write him up for soliciting in the breakroom but that he had refused to sign the document. Rogers said that the first incident Nichols raised involved a dockworker who was passing through the breakroom when Rogers tried to hand him a pamphlet. He said Nichols told him he was on the clock and Rogers denied that. He said Nichols accused him of violating the no-solicitation rule but then told him to forget about it and return to work.

Rogers said that during the second incident he had no discussion of insubordination with Nichols. He said Nichols had a copy of the employee handbook containing the no-solicitation rule but did not read it to him. He said after Nichols told him to go to work, he ran into Pfisterer and spoke with him as they were walking out of the terminal. He said Nichols came to them and stated he had told Rogers to go to work; Rogers agreed. Nichols said he guessed he needed to follow Rogers to his truck; Nichols walked to the dock and watched Rogers go to his truck.

Rogers confirmed that Paulsen was the employee he asked about the Union while both were waiting for their papers from dispatch. While the writeup said that Rogers was seen and heard asking Paulsen to sign a union card, Rogers said he had not done that, that all he had done was ask Paulsen what he thought of the Union.

Rogers said he also spoke with Hardwick about the Paulsen incident, telling the terminal manager that both had been waiting in the breakroom to be dispatched and neither had been working. Rogers stated that Hardwick told him that the breakroom was a work area and that if he wanted to continue soliciting, he would have to do it outside the work area. Rogers asked where that would be and Hardwick said outside the fence.

The Petitioner contended in its brief that the Employer engaged in objectionable conduct by disparately enforcing its no-solicitation rule by allowing other types of solicitation in the breakroom and in work areas while denying employees the right to pass out union literature in the breakroom during the critical period, as shown in the testimony of employees Pfisterer, Picha, Lucas, and Rogers.

The Employer's position was that the Company's no-solicitation policy was found in Case 16–CA–19981 to be valid. In fact, the administrative law judge in that case noted that the complaint did not allege that the rule was unlawful, that the rule itself was not put into evidence and he found, "In the absence of evidence to the contrary, I will assume that the rule published in the employee manual complies with the law." The brief contended that the rule was valid and that it was evenly applied in the breakroom, where employees both take breaks and engage in work while obtaining or submitting manifests.

As to the alleged instances of interference with employee handbilling in the breakroom, the brief argued that the testimony of the employee witnesses was incorrect and that the supervisory testimony correctly showed that the employees were improperly engaged in union activity while at least the recipients of the handbilling were working.

The Board found in *Stoddard Quirk Mfg. Co.,* 138 NLRB 615 (1962), that an employer could lawfully prohibit workers from distributing literature in work areas. However, the Board also has found that such a rule does not apply to a mixed use area. See *United Parcel Service*, 327 NLRB 317 (1998), affd. 228 F.3d 772 (6th Cir. 2000); *Rockingham Sleepwear,* 188 NLRB 698 (1971), enfd. 80 LRRM 3180 (4th Cir. 1972), and *Transcon Lines*, 235 NLRB 1163 (1978).

Transcon Lines is particularly instructive for the Saia situation. In *Transcon*, the offending distribution occurred in a drivers' room where drivers picked up and completed trip documents, read company notices and bulletins, and waited for a driver who would share a trip. They were allowed to drink and eat snacks in this room and converse with each other. The employer argued that this was a work area. The administrative law judge, with Board approval, found that it was a mixed use area. He also noted that the employer allowed other types of solicitation and distribution in this room and that the rule "was

so vague that an employee could never know what distributions or solicitations would be permitted." He concluded that the room was mixed use area where drivers could either work or relax, and that "the drivers' room must be open to statutorily protected activities."

The same should be found as to the breakroom in the Grand Prairie terminal. It is a room where employees may take breaks and eat lunch. But it is also an area where line haul and city drivers receive papers from dispatchers and turn in documents at the end of a trip. It should be found to be a mixed use area. Therefore, employees should have been allowed to take part in distributing union literature when both the giver and the recipient were not working, as set out in *Rockingham Sleepwear*. While the Employer's rule appears to facially valid as far as it goes, it must be found to be ambiguous as to its application in the breakroom. Thus, it was almost impossible for the employees to tell from the rule when it was permissible to solicit and distribute for the Union in the breakroom, because it was almost impossible at times to determine whether another employee was considered to be "working" or "on the clock." Even Terminal Manager Hardwick had a hard time in his testimony in distinguishing between an employee who was on break and who was merely waiting for paperwork. Further, Hardwick seemed to imply that there was one standard for a city driver, who punches a timeclock, and a road driver, who is paid by the mile. Thus, a city driver sitting at a table in the breakroom with a coke and a package of cookies in front of him could have been waiting for dispatch documents after having punched in. Next to him could be a line-haul driver similarly partaking of food and beverage and also waiting to be dispatched; who could properly be solicited under the Employer's rule and who could not? Based on the evidence, I am not sure and that is the point; reasonable employees could not be sure either.

Where there was conflict between the testimony of the employees called by the Petitioner on this objection and the supervisors called by the Employer, I would credit the testimony of the employees, who had a better recollection of what happened to them. Thus, the evidence established that while solicitations for Girl Scout cookies were allowed in the breakroom and even in other clearly work areas, employees were regularly restricted from soliciting and distributing on behalf of the Union in the breakroom. This lack of evenhandedness on the part of the Employer amounted to objectionable conduct.

I recommend that Petitioner's Objection 21 be sustained.